Mikien Sdn Bhd v Woolley Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–320 OF 2007
KANG HWEE GEE J
20 NOVEMBER 2007

Companies and Corporations — Winding up — Stay of proceedings — Whether stay of execution of judgment in civil action apply to winding up proceedings — Whether stay would impede petitioner presenting winding up petition under s 218(1)(e) — Companies Act 1965 s 218

The respondent filed this motion under the inherent jurisdiction of the court for a stay of winding up proceedings presented by the respondent on the ground that the Court of Appeal in an application by the respondent (appellant) in Civil Appeal No W–02–10 of 2007 had by a motion dated 5 June 2007 granted the following order, ie 'bahawa perlaksanaan dan segala prosiding-prosiding selanjutnya yang berkaitan dengan perintah dan penghakiman bertarikh 7 Disember 2006 yang diperolehi oleh responden terhadap pemohon/perayu dalam Mahkamah Tinggi Kuala Lumpur Guaman Sivil No S4–22–43 tahun 2006 adalah dan dengan ini digantung sementara menunggu pendengaran dan perlupusan muktamad permohonan pemohon/perayu untuk kebenaran untuk merayu kepada Mahkamah Persekutuan Malaysia melalui Mahkamah Persekutuan Malaysia Permohonan Sivil No 08–110 of 2007(W)' ('the Court of Appeal order'). The respondent claimed that the motion was premised on the Court of Appeal order, the purport of which was misrepresented by counsel for the petitioner at the hearing on 30 July 2007 to mean that the Court of Appeal's order did not cover winding up proceedings — whereas the respondent submitted that the Court of Appeal's order encompassed winding up proceedings.

Held, dismissing the application with costs:

(1) The Court of Appeal stay order apply strictly to any action 'berkaitan dengan Perintah dan Penghakiman' of the Civil Suit. As counsel for the petitioner had submitted a petition to wind up the company under s 218 of the Companies Act 1965 need not necessarily constitute an action in connection with the order and Judgment dated 7 December 2006 (see para 20).

(2) A petition to wind up the company under s 218 (1)(e) on account of the company being unable to pay its debt need not rest entirely on a judgment that the petition may have obtained from the court. The petitioner is at liberty to provide whatever evidence to support the petition including introducing such evidence of its impecunity from its audited account as the petitioner in the present case seemed to have done. A petition to wind up a company is therefore wholly independent of any other civil actions that a party may commence against the petitioner. Essentially a winding up petition is an action ad rem commenced not only for the personal benefit of the petitioner but for other creditors and contributories which may have an interest in the company. In the event that a winding up order is made, the petitioner would not be entitled absolutely to the assets of the company if any. It would have to share them with the other creditors (see paras 23–24). It followed therefore a stay of execution of a judgment in a civil action should not impede a petitioner presenting a winding up petition under s 218(1)(e) of the Companies Act 1965 (see para 26).

(3) The clarification by the Court of Appeal on the order obtained did not alter the status quo of the decision made earlier on 30 July 2007 granting the respondent a conditional stay. Had it been the intention of the Court of Appeal to prevent the petition from presenting a winding up petition, it would have said so in clear and specific terms (see para 27).

apply strictly

[Bahasa Malaysia summary

Responden telah memfailkan usul ini di bawah bidang kuasa sedia ada mahkamah untuk satu penggantungan prosiding penggulungan yang dikemukakan oleh responden atas alasan bahawa Mahkamah Rayuan dalam satu permohonan oleh responden ('perayu') dalam Rayuan Sivil No W-02-10 tahun 2007 telah melalui satu usul bertarikh 5 Jun 2007 memberikan perintah berikut, iaitu 'bahawa perlaksanaan dan segala prosiding-prosiding selanjutnya yang berkaitan dengan perintah dan penghakiman bertarikh 7 Disember 2006 yang diperolehi oleh responden terhadap pemohon/perayu dalam Mahkamah Tinggi Kuala Lumpur Guaman Sivil No S4–22–43–2006 adalah dan dengan ini digantung sementara menunggu pendengaran dan pelupusan muktamad permohonan pemohon/perayu untuk kebenaran untuk merayu kepada Mahkamah Persekutuan Malaysia melalui Mahkamah Persekutuan Malaysia Permohonan Sivil No 08–110–2007 (W)' ('perintah Mahkamah Rayuan tersebut'). Responden mendakwa bahawa usul tersebut berdasarkan perintah Mahkamah Rayuan, yang mana tujuannya telah disalah tanggap oleh peguam bagi pihak pempetisyen semasa perbicaraan pada 30 Julai 2007 untuk bermaksud yang perintah Mahkamah Rayuan tersebut

A tidak meliputi prosiding penggulungan — manakala responden berhujah bahawa perintah Mahkamah Rayuan meliputi prosiding penggulungan.

Diputuskan, menolak permohonan dengan kos:

B (1) Perintah penggantungan Mahkamah Rayuan hanya digunakan untuk mana-mana tindakan yang 'berkaitan dengan Perintah dan Penghakiman' guaman sivil. Sepertimana yang peguam bagi pihak pempetisyen telah berhujah satu petisyen untuk menggulungkan syarikat di bawah s 218 Akta Syarikat 1965 tidak semestinya membentuk satu tindakan berkaitan dengan perintah dan penghakiman bertarikh 7 Disember 2006 (lihat perenggan 20).

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(2) Satu petisyen untuk menggulung syarikat di bawah s 218(1)(e) berdasarkan syarikat itu tidak mampu membayar hutangnya tidak bergantung sepenuhnya kepada penghakiman yang telah diperoleh oleh pempetisyen daripada mahkamah. Pempetisyen bebas mengemukakan apa-apa keterangan untuk menyokong petisyen tersebut termasuklah keterangan tentang ketidakmampuan membuat pembayaran berdasarkan akaun auditnya sepertimana pempetisyen dalam kes semasa telah lakukan. Petisyen untuk menggulungkan syarikat oleh itu adalah bebas sepenuhnya daripada mana-mana tindakan sivil lain yang mungkin satu pihak telah mulakan terhadap pempetisyen. Yang pentingnya, satu petisyen penggulungan merupakan satu tindakan ad rem yang dimulakan bukan untuk manfaat peribadi pempetisyen sahaja tetapi juga untuk pemiutang dan penyumbang lain yang mungkin mempunyai kepentingan dalam syarikat tersebut. Jika perintah penggulungan itu telah dibuat, pempetisyen tidak berhak langsung terhadap aset-aset syarikat jika ada. Ia perlu membahagikannya dengan pemiutang lain (lihat perenggan 23–24). Oleh itu satu penggantungan pelaksanaan penghakiman dalam satu tindakan sivil tidak menghalang pempetisyen daripada mengemukakan satu petisyen penggulungan di bawah s 218(1)(e) Akta Syarikat 1965 (lihat perenggan 26).

(3) Penjelasan oleh Mahkamah Rayuan berhubung perintah yang diperoleh tidak mengubah status quo keputusan yang telah dibuat terlebih dahulu pada 30 Julai 2007 dengan memberikan responden satu penggantungan bersyarat. Jika ianya niat Mahkamah Rayuan untuk menghalang pempetisyen daripada mengemukakan petisyen penggulungan, ia patut telah menyatakannya dalam terma-terma yang jelas dan spesifik (lihat perenggan 27).]

Notes

For cases on stay of proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1543–1560.

Cases referred to

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187 (refd)

Quantum Far East (M) Sdn Bhd v Kayla Beverly Hills Malaysian Sdn Bhd [2004] 7 MLJ 507 (refd)

RHB Bank Bhd v Gunasingam a/l Ramasingam [2002] 7 MLJ 492 (refd)

Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd ; [2006] 4 CLJ 583 (refd)

Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd [2007] 4 MLJ 33; [2007] 3 MLJ 263 (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(e), (2)(a), 222, 243

Rules of the High Court 1980 O 92

Yee Teck Fah (Yee Teck Fah & Co) for the petitioner.

Harpal Singh (David Matthews, Prakash Lachimanan and Harwinder Kaur with him) (AJ Ariffin Yeo & Harpal) for the respondent.

Kang Hwee Gee J:

[1] This is my oral judgment (ex tempore):

[2] This is a motion under the inherent jurisdiction of the court for a stay of winding up proceedings presented by the respondent on the following ground that the Court of Appeal in an application by the respondent ('appellant') in Civil Appeal No W–02–10–2007 had by a motion dated 5 June 2007 granted the following order:

> bahawa perlaksanaan dan segala prosiding-prosiding selanjutnya yang berkaitan dengan perintah dan penghakiman bertarikh 7 Disember 2006 yang diperolehi oleh responden terhadap pemohon/perayu dalam Mahkamah Tinggi Kuala Lumpur Guaman Sivil No S4–22–43–2006 adalah dan dengan ini digantung sementara menunggu pendengaran dan perlupusan muktamad permohonan pemohon/perayu untuk kebenaran untuk merayu kepada Mahkamah Persekutuan Malaysia melalui Mahkamah Persekutuan Malaysia Permohonan Sivil No 08–110–2007(W).

[3] The motion is opposed by the petitioner on the following grounds: (verbatim)

[4] Res judicata. The Court of Appeal's stay order was raised before the learned Judge Datuk Ramly bin Hj Ali in an application by the respondent to restrain the petitioner from taking further action to wind up the respondent, the petition having been presented but pending the hearing.

The said judge had dismissed the respondent's application for the injunction sought vide Originating Summons No D5–24–156–2007.

[5] On 13 July 2007 the Court of Appeal granted a stay of execution of the High Court Order in Civil Suit S4–22–43–2006 and on 27 July 2007 the judgment debtor made an application to this court to stay the petition purportedly under s 222 of the Companies Act 1965. The application was heard on 30 July 2007 and the court granted a conditional stay conditional upon the judgment debtor paying RM2.3m into a joint solicitors' account. The conditional stay of the winding up proceedings until 30 October 2007 failing which it was ordered that the judgment creditor would be at liberty to continue with the winding up petition. The judgment debtor did not appeal this order. Neither did they comply with the conditional order.

[6] Accordingly the petition was fixed for hearing on 30 October 2007. On this day the judgment debtor raised a preliminary objection that the judgment creditor did not serve the petition on the Official Receiver pursuant to r 25(3). The court fixed the date for hearing of the petition on 10 December 2007 after the petition can be served on the Official Receiver.

[7] This application for stay and other reliefs (restraining advertising of this petition, expunging conditional order granted by this court on 30 July 2007, the judgment creditor's firm be restrained from acting for the petitioner) is res judicata.

[8] There is no jurisdiction for this court to grant a stay under O 92 of the Rules of the High Court 1980 because s 243 prevents the court from granting a stay before winding up order. See *Quantum Far East (M) Sdn Bhd v Kayla Beverly Hills Malaysian Sdn Bhd* [2004] 7 MLJ 507.

[9] This petition is based on the respondent's inability to pay its debt and not on a judgment. Although we had served the statutory notice under s 218(2)(a) of the Companies Act 1965 this does not mean that the petition is based on the judgment. See *Maril-Rionebel (M) Sdn Bhd and Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 per Gopal Sri Ram JCA at p 198:

> But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition.

[10] Our petition is also based as evidence on the actual inability of the company to pay its debt. Here we are relying on its audited account for the year ended 31 December 2002 and the non existence of any audited accounts at the company's registry thereafter. See *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd* ; [2006] 4 CLJ 583 at p 592 — failure to submit account raises the presumption that the company is not commercially solvent.

[11] The judgment debtor is not entitled to have another bite of the cherry after the court has granted the conditional stay on 30 July 2007 which the judgment debtor did not comply.

Reply by counsel for the respondent (verbatim)

[12] The motion is premised on a Court of Appeal order, the purport of which was misrepresented by counsel for the petitioner at the hearing on 30 July 2007 to mean that the Court of Appeal's order did not cover winding up proceedings — whereas my contention that the Court of Appeal's order encompassed winding up proceedings. The court appeared to be persuaded by the submission of counsel for the petitioner that the Court of Appeal did not grant an order encompassing stay of proceeding. Now we have a sealed copy order of the Court of Appeal dated 13 July 2007. This order however did not say that it was a stay of execution only but includes the stay of all proceedings as the words '*dan segala prosiding-prosiding selanjutnya yang berkaitan dengan perintah dan penghakiman bertarikh 7 December 2006 yang diperolehi oleh responden terhadap pemohon/perayu dalam Mahkamah Tinggi Kuala Lumpur Guaman Sivil No S4–22–43–2006 adalah dan dengan ini digantung* sementara menunggu pendengaran dan perlupusan muktamad permohonan Pemohon/Perayu untuk kebenaran untuk merayu kepada Mahkamah Persekutuan Malaysia melalui Mahkamah Persekutuan Malaysia Permohanan Sivil No 08–110–2007(W).'

[13] The application before Justice Ramly's injunction was filed to restrain the winding up — not res judicata because it was dismissed only on ground that the application was ex post facto as by then the petition had been filed and the court held that it had no jurisdiction.

[14] The order on the 30 July 2007 has not been perfected for the reason that there was a dispute and this court is competent to set aside the order.

[15] We had moved the Court of Appeal when we applied for a stay to include a stay of winding up proceedings.

[16] The intitulement in the petition does not specify under what provision of the Companies Act this petition is premised on.

[17] The petition fails to identify the clarity under which subsection of s 218 of the Act the petition was presented and the petition ought to be struck out for want of compliance. See *Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd* [2007] 4 MLJ 33; [2007] 3 MLJ 263 at p 264 at Held (1).

FINDINGS AND DECISION

[18] Having heard the parties it is clear that what the respondent is attempting to do in this application is to have his previous application reheard on the ground that it had obtained a clarification of the order of the stay of execution on Civil Suit No S 4–22–43–2006.

[19] The parties have now confirmed that the order of the Court of Appeal should read as follows:

> bahawa perlaksanaan dan segala prosiding-prosiding selanjutnya yang berkaitan dengan perintah dan penghakiman bertarikh 7 Disember 2006 yang diperolehi oleh responden terhadap pemohon/perayu dalam Mahkamah Tinggi Kuala Lumpur Guaman Sivil No S 4–22–43–2006 adalah dan dengan ini digantung sementara menunggu pendengaran dan perlupusan muktamad permohonan pemohon/perayu untuk kebenaran untuk merayu kepada Mahkamah Persekutuan Malaysia melalui Mahkamah Persekutuan Malaysia Permohonan Sivil No 08–110–2007 (W).

[20] The catchword that should determine what the Court of Appeal meant by its order is the phrase 'berkaitan dengan perintah dan penghakiman bertarikh 7 Disember 2006', that is to say in its translated form 'in connection with the order and judgment dated 7 December 2006'.

[21] Having read the above order with circumspection, I would interpret the stay order as to apply strictly to any action "berkaitan dengan perintah dan penghakiman" of the civil suit.

[22] Now as counsel for the petitioner had submitted a petition to wind up the company under s 218 of the Companies Act 1965 need not necessarily constitute an action in connection with the order and judgment dated 7 December 2006. As Gopal Sri Ram JCA said in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 at p 198:

> But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand

issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. A

[23] It is pertinent to note that a petition to wind up the company under s 218(1)(e) on account of the company being unable to pay its debt need not rest entirely on a judgment that the petition may have obtained from the court. The petitioner is at liberty to provide whatever evidence to support the petition including introducing such evidence of its impecunity from its audited account as the petitioner in the present case seems to have done. B C

[24] A petition to wind up a company is therefore wholly independent of any other civil actions that a party may commence against the petitioner. Essentially a winding up petition is an action ad rem commenced not only for the personal benefit of the petitioner but for other creditors and contributories which may have an interest in the company. In the event that a winding up order is made, the petitioner would not be entitled absolutely to the assets of the company if any. It would have to share them with the other creditors. D

[25] See *RHB Bank Bhd v Gunasingam a/l Ramasingam* [2002] 7 MLJ 492 at p 498: E

> A creditor who petitions the court to wind up a company under s 218(e) of the Companies Act 1965 is not exercising his right in personam to execute a judgment debt against the company as he would in an execution proceeding, but merely his right in rem to claim against the assets of the company along with other creditors whom the company may be liable to upon being wound up. To quote Phillimore LJ in *Re A Company* [1915] 1 Ch 520 at p 528, a view affirmed by the Court of Appeal in *Re International Tin Council* [1988] 3 WLR 1159: F
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> > In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding up than any other creditor … G
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> > She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode which she no longer seeks to recover for herself alone but for the benefit of all the creditors … H

[26] It follows therefore a stay of execution of a judgment in a civil action should not impede a petitioner presenting a winding up petition under s 218(1)(e) of the Companies Act 1965. I

[27] The clarification by the Court of Appeal on the order obtained does not therefore alter the status quo of the decision which I made earlier on

30 July 2007 granting the respondent a conditional stay. Had it been the intention of the Court of Appeal to prevent the petition from presenting a winding up petition, it would have said so in clear and specific terms.

Application dismissed with costs.

Reported by Loo Lai Mee